TAN WEE HUN

v.

INCHCAPE EQUATRON (M) SDN BHD

HIGH COURT MALAYA, SHAH ALAM
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: 12-5-97]
16 MARCH 1998

CIVIL PROCEDURE: *Judgments and orders - Writ of seizure and sale - Enforcement of - Service of judgment on judgment debtor - Whether a prerequisite - Whether judgment creditor entitled to writ of seizure and sale without serving judgment or order on judgment debtor - Subordinate Courts Rules 1980, O. 30 rr. 1, 12, O. 31 r. 3(2)(d), O. 33*

BANKRUPTCY: *Capacity of bankrupt - Undischarged bankrupt - Limitations - Transactions entered into after bankruptcy - Validity of transactions - Whether valid and enforceable - Knowledge of bankruptcy - Whether material - Bankruptcy Act 1967, ss. 38(d), 109*

On 23 December 1994 the Sessions Court had ordered the appellant to pay a certain sum of money to the respondent together with interest thereon ("the Order"). Thereafter a writ of seizure and sale was issued at the instance of the respondent and the premises of the appellant was seized on 27 September 1995. In July 1996, the appellant applied to the judge of the Sessions Court to set aside the Order, on the grounds: (a) that a copy of the Order was not served on him before execution proceedings were commenced against him; (b) that there was an agreement for a settlement of a lesser sum made on 30 December 1994 *ie*, after the Order was obtained; (c) that the debt to the respondent was incurred by him after he had been adjudicated a bankrupt on 18 November 1993, and that being so, the debt was incurred in contravention of ss. 38(d) and 109 of the Bankruptcy Act 1967 and was unenforceable; and (d) that he had a reasonable defence to the respondent's claim. The appellant's application was refused by the learned Sessions Court judge. Hence, the present appeal to the High Court.

Held:

[1] There is no provision in the Subordinate Courts Rules 1980 requiring that a court order should be served upon a judgment debtor. A judgment creditor is therefore entitled to obtain a writ of seizure and sale without the pre-condition of having served the judgment debtor with a copy of the judgment or order.

[2] The parties may enter into an agreement to receive a lesser amount in full settlement and discharge of the judgment sum, but that is a separate matter upon which the parties may sue or be sued. The latter does not affect the legal efficacy of the judgment or order by the court in the original action. Furthermore, the purported agreement did not bear evidence of payment of stamp duty and hence the court cannot give it cognisance.

[3] The respondent in this case was not tainted with illegality, only the appellant himself was. To allow the objection raised by the appellant (*ie*, that the transaction entered into with the respondent was illegal and unenforceable by virtue of ss. 38(d) and 109 of the Act) would tantamount to allowing the appellant the benefit of not being bound to the contract on the grounds it is illegal for him to enter into such a contract. Such a result is plainly inequitable and unjust. Clearly, the basis of unenforceability is not so much whether the transaction is illegal or not but whether the party seeking to enforce it is tainted by the illegality.

[4] A bankrupt may enter into transactions after his bankruptcy and such transactions are not illegal and unenforceable *ab initio*. To shield a bankrupt from being bound by transactions he enters into after he has been adjudged bankrupt would amount to greater license to bankrupts to transact business irresponsibly. The object of the Bankruptcy Act is to protect the public from irresponsible businessmen who transact business when they know they do not have the financial capacity to meet their payment obligations.

[5] Knowledge of bankruptcy is a relevant issue where a bankrupt is charged with an offence, but knowledge is irrelevant as to his status as a bankrupt. A person is a bankrupt when he is adjudged a bankrupt irrespective of his knowledge of the same.

[6] The assertion that the appellant had a reasonable defence to the respondent's claim was a bald assertion. It was not backed by any information or evidence or particulars upon which the court could make a decision.

[Appeal dismissed.]

Case(s) referred to:

Gan Hong Hoe v. Gan Kim Hee [1939] 8 MLJ 295 ***(refd)***

Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd [1990] 3 MLJ 248 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 38(2)(d), 40, 49, 109(m)

Subordinate Courts Rules 1980, O. 30, O. 31 rr. 2(1)(c), (d), 3(2)(d), O. 33

For the appellant - N Ravindra; M/s Ravindra & Assoc
For the respondent - Daniel Siew; M/s Shui-Tai

Reported by Ling Hea Hoon

JUDGMENT

Abdul Wahab Patail J:

The appellant, Tan Wee Hun, had filed on 23 July 1996 an application for orders that:

- Leave to file that application out of time.
- The decision of 23 December 1994 be set-aside.
- Stay of execution until the hearing of the application.
- Costs of the application.

On 23 December 1994 the Sessions Court had ordered that the appellant pay to the respondent, Inchcape Equatron (M) Sdn Bhd the sum of $49,813 together with interest thereon at the rate of eight percent per annum from 5 November 1994 until date of full payment and costs of $1,085.

The appellant is dissatisfied with the decision of the judge of the Sessions Court at Shah Alam made on 9 December 1996 refusing to set-aside the order made on 23 December 1994.

In support of his application of 23 July 1996, the appellant said that a receiving order and an adjudication order had been made against him on 18 November 1993. But he had no knowledge of the orders in October 1995 after the respondent had issued a writ of seizure and sale and had seized his premises on 27 September 1995. Only then, he said, he had appointed solicitors in his defense. His solicitors, he said, had conducted a bankruptcy search on him and found that he had been adjudged a bankrupt on 18 November 1993. Upon the advice then of his solicitors he had contacted the public trustee and filed his statement of affairs.

In the same affidavit, the appellant said that his solicitors had written on 6 October 1995 to the Public Trustee for leave to set-aside writ of seizure and sale. A copy of the letter was extended to the solicitors for the respondent. Only on 9 December 1995 was leave granted. The appellant's grounds, from his affidavit are as follows:

> 10. Saya juga tidak diserahkan penghakiman dalam tindakan ini dan percaya bahawa pihak plaintif telah memperolehi penghakiman yang tidak sah atas alasan yang berikut.

11. Pada 30hb. Disember 1994 pihak plaintif telah menanda tangani satu perjanjian baru untuk jumlah RM44,813.00. Tetapi penghakiman ingkar telah diambil terhadap saya pada 23hb Disember 1994 untuk jumlah RM49,813.00. Sesalinan surat tersebut adalah dilampirkan disini dan dieksibit sebagai 'TWH-3'.

12. Saya percayai dan juga dinasihati oleh peguamcara saya bahawa penghakiman bertarikh 23hb Disember 1994 yang diperolehi oleh plaintif dalam tindakan ini adalah salah dari segi undang-undang kebankrapan dan juga tidak sah lagi kerana perjanjian baru telah dimasuki oleh plaintif untuk hutang tersebut.

13. Saya telah dinasihatkan oleh peguamcara saya dan amat percaya bahawa saya sesungguhnya percayai dan dinasihatkan oleh peguamcara saya bahawa saya mempunyai pembelaan yang munasabah terhadap tuntutan plaintif.

14. Sekiranya penghakiman bertarikh l3hb Disember 1994 tersebut tidak diketepikan, saya akan amat dimemudaratkan kerana tidak akan dapat membela tuntutan plaintif yang perlu dibuktikan secara terperinci sebelum penghakiman tersebut boleh diberikan dengan sempurnanya oleh Mahkamah. Pihak plaintif telah juga memulakan tindakan yang baru dalam Kebankrapan No. D4-29-1104-96 di Mahkamah Tinggi, Kuala Lumpur.

15. Dengan mengambil kira perkara di atas, saya memohon supaya penghakiman bertarikh 13hb Disember 1994 tersebut diketepikan dan selanjutnya digantung sebarang pelaksanaan Penghakiman tersebut oleh plaintif. Saya telah dinasihatkan dan amat percaya bahawa saya mempunyai alasan yang sah untuk membuang tuntutan plaintif apabila ianya dibicarakan nanti.

16. Oleh yang demikian, saya memohon bagi perintah-perintah seperti yang dikehendaki oleh permohonan saya di sini.

The first ground as given in para 10 is as follows

10. Saya juga tidak diserahkan penghakiman dalam tindakan ini dan percaya bahawa pihak plaintif telah memperolehi penghakiman yang tidak sah atas alasan yang berikut.

While the second part of para. 10 is introductory of the other grounds set out in subsequent paragraphs, the first part raises the objection that a copy of the order of 23 December 1994 had not been served upon the appellant.

Now O. 30 of the Subordinate Courts Rules 1980 provides that a judgment or order for the payment of money may be enforced by one or more of the following means, that is to say (a) a writ of seizure and sale, (b) garnishee proceedings or (c) an order of committal: see r. 1. Rule 12 of the said order deals with the enforcement of judgments and orders for the recovery of money.

It provides that O. 31 to 33 shall apply, relating to writs of execution, writs of seizure and sale, and garnishee proceedings respectively. There is no provision requiring that the court order should be served upon the appellant. Only O. 31 r. 3(2)(d) requires that a demand to satisfy the judgment or order made upon the person liable to satisfy it be a prerequisite, but that applies only in cases that fall under r. 2(1)(c) or (d) of the said order and which are of no application to this case. A judgment creditor is therefore entitled to obtain a writ of seizure and sale without the pre-condition of having served the judgment debtor with a copy of the judgment or order. Otherwise a judgment debtor could easily negate the value of a judgment against himself by resorting to the devise of avoiding service.

It is furthermore on record that a notice of the judgment was delivered by registered letter dated 7 January 1995 and according to the stamp, it was received on 11 February 1995. Having knowledge of the judgment, application to set aside the judgment of 23 December 1994 was only made on 23 July 1996.

The second objection is that there is an agreement for the settlement in the sum of $44,813.00, made on 30 December 1994. The said agreement is contained in the letter as follows:

30 December 1994

Mr Tan Wee Hun
...
...

Dear Mr Tan

RE: OUTSTANDING AMOUNT SUM OWING BY THE ONE ELECTRIC SUPPLIER

SAMSUNG: RM42,613.00)
ALTIS: RM 2,200.00) TOTAL: RM44,813.00

We refer to the above matter and our discussion dated 28/12/94.

Terms and conditions agreed by both parties are stated below:-

1. Agreed to settle RM5,600.00 by 7 equal instalments monthly payment of RM5,600.00 payable from January 1995 until July 1995 and RM5,613.00 to be payable on August 1995.

2. In the event of any default in one payment we have the right to recover the balance and the interest therein and cost without any reference to you.

Kindly return the duplicate copy of this letter duly and signed consenting to the terms and conditions to our solicitor to record consent judgement.

Yours faithfully

for INCHCAPE EQUATRON (M) SDN BHD

...

I, Tan Wee Hun, consent to the above terms and conditions and consent judgment recorded.

...

According to the solicitors the agreement above was entered into between the parties without the advice of the solicitors. I agree that obviously they were not aware that the judgment in default had already been obtained on 23 December 1994. What then is the status of the default judgment obtained on 23 December 1994? The short answer is that the judgment stands. The parties may enter into an agreement to receive a lesser amount in full settlement and discharge of the judgment sum, but that is a separate matter upon which the parties may sue or be sued. The latter however does not affect the legal efficacy of the judgment or order by the court in the original action. Furthermore the purported agreement does not bear evidence of payment of stamp duty and for this additional reason I cannot give it cognisance.

The next objection is as follows:

12. Saya percayai dan juga dinasihati oleh peguamcara saya bahawa penghakiman bertarikh 23hb Disember 1994 yang diperolehi oleh plaintif dalam tindakan ini adalah salah dari segi undang-undang kebankrapan dan juga tidak sah lagi kerana perjanjian baru telah dimasuki oleh plaintif untuk hutang tersebut.

It was submitted the debt was incurred after he was adjudicated a bankrupt. This objection is based on s. 38(d) of the Bankruptcy Act 1967 which provides that the bankrupt shall not, without the previous permission of the official assignee or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company.

Section 109 of the same Act provides that any person who has been adjudged bankrupt or in respect of whose estate receiving order has been made under this Act shall be punished with imprisonment which may extend two years or with fine or with both if, being an un-discharged bankrupt, he either alone or jointly with any other person obtains credit to the extent of 100 ringgit or upwards, unless he proves that before obtaining the credit he informed the person giving the credit that he was an un-discharged bankrupt or either alone or jointly with any other person he engages in any trade or business or enters

into any contract in furtherance of any trade or business, unless he proves that before engaging in the trade or business or before entering into the contract he informed the person with whom he engages in the trade or business or with whom he entered into the contract that he was an un-discharged bankrupt.

It was argued that since it was an offence under s. 38(d) for the appellant to transact business without the previous permission of the official assignee or the court, and could be punished also under s. 109, then the transaction entered into with the respondent is illegal and could not be enforced. The case of *Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd* [1990] 3 MLJ 248 HC was cited in support of the argument. In that case, neither Metroplex nor Dr Iaduray who assigned all his interest in a set of x-ray machines to Dr Sebastian, or Dr Sebastian as purchaser, had the license to sell or dispose or purchase x-ray apparatus thereby contravening the Radioctive Substances Act 1968. In other words the transaction was void *ab initio* as it was in breach of the Radioctive Substances Act 1968. Upon the application of Dr Sebastian, the sale was held to be illegal and not enforceable.

In this case the transaction would otherwise have been legal and enforceable. The respondent himself is not tainted with illegality. If anyone were, it was the appellant himself. To allow the objection raised by the appellant is tantamount to allowing the appellant the benefit, by merely saying he had never informed the respondent that he was an un-discharged bankrupt, of not being bound to the contract on the grounds it is illegal for him to enter into such a contract. Such a result is plainly inequitable and unjust. It would allow an offender to be protected from civil suit by an innocent victim simply by raising the act that he committed and giving rise to the civil suit was illegal because it is an offence. If that were so, a thief would be protected from suit by a victim, on the argument that theft is a criminal offence. The basis of unenforceability is not so much whether the transaction is illegal or not but whether the party seeking to enforce it is tainted by the illegality.

In *Gan Hong Hoe v. Gan Kim Hee* [1939] 8 MLJ 295, it was held debts accrued after bankruptcy are not provable in relation to that bankruptcy, and are not released by the discharge of that bankruptcy. Indeed s. 40 of the Bankruptcy Act limits the debts that are provable in a bankruptcy. This suggests that debts, and conversely profits could accrue. Whilst under s. 38 he cannot transact business without the prior permission of the official assignee or the court, he is punishable only upon the application of the official assignee. The irresistible conclusion is that he may enter into transactions and such transactions are not illegal and unenforceable *ab initio*.

Appellant's counsel submitted that if appellant is allowed to transact business it would defeat the laws of bankruptcy. One is somewhat bemused by this argument. Firstly, he is arguing for the appellant who is the bankrupt. Secondly it is also clear that the adjudication and receiving orders did not stop the appellant from entering into further business transactions. To shield a bankrupt from being bound by transactions he enters into after he has been adjudged bankrupt would in fact amount to greater license to bankrupts to transact business irresponsibly. The public must be protected. The object of the Bankruptcy Act is to protect the public from irresponsible businessmen who transact business when they know they do not have the financial capacity to meet their payment obligations. For that reason a petitioner may petition for adjudication and receiving orders to place all of a bankrupt's assets as at that date into the hands of the official assignee who will see to its application fairly to all creditors. The bankrupt is not absolutely prevented from doing business. He may do so if he has prior permission of the official assignee. If he does not, he can be punished under s. 38(2) of the Bankruptcy Act. Even if he has received permission, he must inform the other party he is an undischarged bankrupt: see s. 109(m) of the Bankruptcy Act. He may be declared bankrupt a second time for other debts not provable for the first bankruptcy: see s. 49 of the Bankruptcy Act. Parties who have no notice of any act of bankruptcy is also protected: s. 54(1)(d)(ii) of the Bankruptcy Act.

What then if the bankrupt says he was not aware he has been adjudged a bankrupt? While knowledge may be a relevant issue where he is charged with an offense, knowledge is irrelevant as to his status as a bankrupt. He is a bankrupt when he is adjudged a bankrupt.

For this reason I reject the first part of this objection. The second part of this objection has already been dealt with earlier above.

The next objection is:

> 13. Saya telah dinasihatkan oleh peguamcara saya dan amat percaya bahawa saya sesungguhnya percayai dan dinasihatkan oleh peguamcara saya bahawa saya mempunyai pembelaan yang munasabah terhadap tuntutan plaintif.
>
> 14. Sekiranya penghakiman bertarikh l3hb Disember 1994 tersebut tidak diketepikan, saya akan amat di memudaratkan kerana tidak akan dapat membela tuntutan plaintif yang perlu dibuktikan secara terperinci sebelum penghakiman tersebut boleh diberikan dengan sempurnanya oleh Mahkamah. Pihak plaintif telah juga memulakan tindakan yang baru dalam Kebankrapan No. D4-29-1104-96 di Mahkamah Tinggi, Kuala Lumpur.

Taking the matters in the reverse order of appearance, it is clear that there is no bar to a second receiving order. It may well be that the appellant will be prejudiced if he is not allowed to make his defense against the order of 13 December 1994. This assertion of an order made on 13 December 1994 is repeated in para. 13, 14 and 15. But there is no such order made on 13 December 1994. There is no similar assertion in respect of the order of 23 December 1994 made against the appellant. In other words there is no evidence advanced to support the application in relation to the order made on 23 December 1994. Apart from the fact that these assertions are made in the body of a sworn affidavit and is not therefore a mere error of form, and which may only be corrected by a further affidavit, it exhibits a lack of concern as to the correctness or truthfulness of the matters dealt with by the affidavit. It destroys the credibility of the affidavit and the deponent's application with it.

Furthermore, there is only mere assertion that the appellant has a reasonable defense. It is an assertion of a legal result, not of a fact. It is not backed by any information or evidence or particulars upon which the court can make a decision. Given the evidence of lack of concern as to the correctness of factual assertions in the affidavit, the court cannot give any weight to the mere assertion in para. 13.

This court is of the view therefore, that the learned judge of the Sessions Court is entirely correct in rejecting the appellant's application.

I therefore dismiss this appeal with costs.